

**Courtenay Wind Farm
Case No. PU-13-64**

RESPONSE TO NOTICE INFORMATION

I. Introduction.

On July 12, 2013, the North Dakota Public Service Commission (“Commission”) held a public hearing on the Certificate of Site Compatibility application (“Application”) for the Courtenay Wind Farm (“Project”) filed by Courtenay Wind Farm, LLC (“Courtenay”). On July 22 and 24, 2013, four letters were filed with the Commission: (1) a letter from Kyle C. Wanner, North Dakota Aeronautics Commission (the “NDAC”), dated July 23, 2013 (the “NDAC letter”); (2) a letter from Robert and Julie Sprague, dated July 18, 2013 (the “Sprague letter”); (3) a letter from James and Sharon Hastings, dated July 18, 2013 (the “Hastings letter”), which was submitted with the Sprague letter; and (4) a letter from Grant Baumgartner, dated July 22, 2013 (the “Baumgartner letter”).

On August 21, 2013, the Commission issued a Notice of Intent to Consider Additional Information Not Presented At a Hearing, in which it indicated its intent to consider the NDAC letter, the Sprague letter, the Hastings letter, and the Baumgartner letter (collectively, the “Notice Information”). On August 29, 2013, Courtenay filed its written request to examine and present its own information and evidence in response to the Notice Information in accordance with N.D.C.C. § 28-32-25. On September 12, 2013, Courtenay filed an update letter, in which it indicated that it planned to submit its response to the Notice Information at the same time as filing its late-filed exhibits and proposed Findings of Fact, Conclusions of Law and Order.

II. Response to Notice Information.

In response to the Notice Information, Courtenay submits the following information and evidence.

A. Baumgartner Letter.

In response to the Baumgartner letter, Courtenay provides a copy of a joint letter from Mr. Baumgartner and Courtenay to the Commission, dated September 16, 2013, attached as **Exhibit A**. As discussed in Exhibit A, Courtenay has agreed to implement certain measures that reasonably address Mr. Baumgartner’s concerns, and said measures are included in Courtenay’s proposed Findings of Fact, Conclusions of Law and Order.

B. Hastings Letter.

In response to the Hastings letter, Courtenay provides the following information and evidence:

1. James and Sharon Hastings executed a lease agreement with Courtenay on July 15, 2013 (after the July 12, 2013 public hearing on Courtenay’s Application), and

the Hastings will be compensated for any Project impacts pursuant to the terms of that agreement. Courtenay showed a map of the Project layout to the Hastings before the Hastings executed the lease agreement.

2. No Project facilities will be located on the Hastings' property.
3. Permanent Met Tower B and Turbine Nos. 21 and 22 are the only major facilities within the same section as the Hastings' real property. Turbine No. 21 will be located approximately 1821 feet from the Hastings' residence, and Turbine No. 22 will be located approximately 2517 feet from the Hastings' residence. Thus, Courtenay has complied with the Commission's 1,400 foot setback for turbines from the Hastings' residence.
4. Based on conservative acoustic modeling, the sound levels within 100 feet of the Hastings' residence will not exceed fifty (50) dBA, in accordance with the Commission's avoidance area requirements. *See* Hearing Exhibit 13. Likewise, the sound levels at the Hastings' residence will comply with the Stutsman County Wind Zoning Ordinance setback requirements. *See id.*
5. Based on conservative shadow flicker modeling, the estimated shadow flicker impacts at the Hastings' residence will be far below the 30 hour per year goal established by Courtenay and utilized in past North Dakota wind energy conversion facilities siting cases. *See* Hearing Exhibit 8.
6. Courtenay spoke with Mr. Hastings several times after the Hastings letter was filed, both via telephone and in person, to try to address any concerns. In their most recent conversations, Mr. Hastings indicated that he appreciated Courtenay's attempts to address his concerns and that he did not oppose the overall Project.

As noted above, the concerns raised in the Hastings letter are unsupported, have been adequately addressed, or have been refuted by the information and evidence Courtenay has presented.

C. NDAC Letter.

In response to the NDAC letter, Courtenay submits the following exhibits:

- A copy of an Airspace Executive Summary, prepared for Courtenay by Federal Airways and Airspace, a firm specializing in aeronautics that was retained to evaluate the issues raised by the NDAC regarding the Sprague airstrip. The report is attached as **Exhibit B**, and was provided to the NDAC (*see* Exhibit D).
- A copy of notes from a conference call between Courtenay and NDAC on August 13, 2013, which is attached as **Exhibit C**.
- A copy of a letter from Courtenay to the NDAC, dated August 26, 2013, which is attached as **Exhibit D**. The attachments referenced in the letter are provided in Exhibits B, C and E.

- A copy of e-mail correspondence between Courtenay and the NDAC, which is attached as **Exhibit E**.

As set forth in Exhibits C, D and E, in communications between the NDAC and Courtenay that occurred after the filing of the NDAC letter, the NDAC acknowledged the following key points:

- Prior to filing its Application, Courtenay contacted the NDAC regarding any potential aeronautics concerns. The NDAC did not identify any issues with the Project because no public airports would be impacted.
- The NDAC letter was written as though the Sprague airstrip were a public airport. However, the Sprague airstrip is, in fact, a private runway, and not a public airport.
- As a private runway, the Sprague airstrip is not protected under either federal or state aviation laws or regulations, including the laws and regulations cited in the NDAC letter.
- Even if the Sprague airstrip were a public airport, the runway length falls below the threshold for the protections under FAA Part 77 outlined in the NDAC letter.
- Mr. Sprague is responsible for taking the steps necessary to protect the airspace around his private airstrip, including acquiring airspace rights from neighboring landowners.
- Although not a public airport, a takeoff/landing modification is available that addresses any potential safety concerns outlined in the NDAC letter.

Based on Exhibits B, C, D and E, including the facts acknowledged by the NDAC (noted above), the NDAC's letter should not preclude issuance of a Certificate of Site Compatibility for the Project, including for Turbine Nos. 1, 2, 3, 10, 11, 12, 13, 21, and 22, and permanent Met Tower B, for the reasons set forth below:

1. First, no evidence has been presented that the Project will impact the continued safe operation of the Sprague airstrip. In its letter, the NDAC noted issues that might apply if the Sprague airstrip were a public airport, which the NDAC admits it is not. The NDAC did not present any actual evidence that the safety of the Sprague airstrip will be compromised by the Project.
2. Second, Courtenay's aeronautics' experts, Federal Airways and Airspace, have identified a measure to address any safety concerns that may have existed if the Sprague airstrip were a public airport. As explained in the Federal Airways and Airspace report, the Spragues could modify their takeoff/landing procedure, which would meet safety standards for public airports (which, as noted above, are not even applicable to the Sprague airstrip). *See Exhibit B, pgs. 7-9.* Essentially, the Spragues could takeoff and land so as to turn to the west, away from the Project, rather than to the east. As set forth in the report, the same takeoff/landing

modification has been utilized at public airports (such as the Laughlin/Bullhead International Airport near Bullhead City, Arizona), and implementing the modification enabled compliance with FAA regulations. *See id.*, pg. 9.

The NDAC indicated that the takeoff/landing modification mitigates its potential safety concerns for the Sprague airstrip, but also indicated it would like to see Spragues' approval of the modification. *See* Exhibit E. However, whether or not Spragues approve of the modification has no bearing on the adequacy of the mitigation measure proposed. As documented in the Federal Airways and Airspace report and in the correspondence between Courtenay and the NDAC, the proposed takeoff/landing modification addresses any potential safety concerns regarding the proximity of the Project to the Sprague airstrip. *See* Exhibits B, C, D and E. Furthermore, while the Spragues continue to publicly oppose permitting of a certain portion of the Project facilities, in discussions with Courtenay, Mr. Sprague acknowledged that the proposed takeoff/landing modification addressed his potential safety concerns with respect to use of his airstrip.

3. Third, the Project will not violate any federal or state aviation laws or regulations, even if the Spragues refuse to implement the proposed takeoff/landing modification. As the NDAC acknowledges, the Sprague airstrip is a private runway, and not a public airport; thus, the airstrip is not protected by state or federal aviation laws or regulations. *See* Exhibits C and D. Federal Airways and Airspace explains in more detail the unprotected status of the Sprague airstrip as a private runway in its report, and concludes by stating that "the project complies with State and Federal aeronautics regulation and is not considered a hazard to aviation." *See* Exhibit B. The fact that the Project will meet federal aviation laws and regulations is further evidenced by the fact that the Federal Aviation Administration issued Determinations of No Hazard for the Project layout, including for Turbine Nos. 1, 2, 3, 10, 11, 12, 13, 21, and 22, and permanent Met Tower B. *See* Determinations of No Hazard to Air Navigation, dated September 4, 2013, attached as **Exhibit F**.

As discussed above, no applicable safety concerns were raised in the NDAC letter regarding the proximity of the Project to the Sprague airstrip, and no evidence was presented that the Project poses a safety risk to the Sprague airstrip. In addition, Courtenay has addressed potential safety concerns that may have existed if the Sprague airstrip were a public airport (which it is not) by identifying a takeoff/landing modification that could be utilized by the Spragues. Again, even if the Spragues refuse to implement the takeoff/landing modification, there is no evidence of a safety issue. Further, the evidence demonstrates that the Project will comply with all state and federal aviation laws and regulations.

D. Sprague Letter:

Courtenay provides the following information and evidence in response to the concerns outlined by the Spragues in the Sprague letter:

1. Concern #1: In their letter, the Spragues assert that their home should have been shown on Hearing Exhibit 4 because it is within 5,000 feet of the Project Area. However, Hearing Exhibit 4 depicts homes within 5,000 feet of a proposed turbine location. An inadvertent error was made in the footnote to the Distance Between Homes and Nearest Turbines chart provided in Hearing Exhibit 4, which states that the chart includes homes within 5,000 feet of the Project Area. As the information in the chart indicates, it covers homes within 5,000 feet of a turbine. Although the Spragues' home is within 5,000 feet of the Project Area, it is approximately 5,440 feet from the nearest turbine location, which is why it was not depicted on Hearing Exhibit 4.

The Spragues also state that they are concerned about the proximity of their private runway to certain turbines and a permanent met tower location. In response to this concern, Courtenay notes the following:

- First, the Spragues do not provide any evidence that the Project will affect the continued safe operation of their private runway.
- Second, after the public hearing, the Spragues expressed to Courtenay an interest in leasing their property for the Project. Since the Spragues' property was outside of the Project Area, Courtenay did not pursue leasing the property. The fact that the Spragues sought to lease their property to Courtenay indicates that they do not have a genuine concern regarding the proximity of the Project to their private runway.
- Third, as discussed in response to the NDAC letter, the Spragues' private runway is not subject to or protected by state or federal aviation laws or regulations. The Spragues are responsible for acquiring any airspace rights they may need in order to protect their airstrip,¹ and Courtenay has confirmed that the Spragues have not acquired any airspace rights on any of the land owned by those who have executed lease agreements with Courtenay for the Project. By requesting that the Commission not permit certain Project facilities, the Spragues are essentially trying to control their neighbors' airspace without acquiring the necessary property rights to do so. The Spragues' right to have a private airstrip on their property does not give them the right to dictate how their neighbors use their properties.

¹ As noted by the NDAC, public entities that develop public airports must acquire property rights from the landowners in the vicinity of the airport in order to protect airspace rights. *See* N.D.C.C. § 2-02-04 ("Where necessary, in order to provide unobstructed air space for the landing and taking off of aircraft utilizing airports and landing fields acquired or maintained under the provisions of this chapter, the counties, cities, park districts, and townships may acquire such air rights over private property as are necessary to ensure safe approaches to the landing areas of said airports and landing fields. Such air rights may be acquired by grant, purchase, lease, or by right of eminent domain in the same manner as is provided in section 2-02-02 for the acquisition of the airport or landing field itself or the expansion thereof.").

- Fourth, Courtenay has identified a takeoff/landing modification that Spragues can utilize that would mitigate potential safety concerns even if the Sprague airstrip were a public airport. Courtenay presented the takeoff/landing modification to Mr. Sprague, who acknowledged that the modification resolved his potential safety concerns, but noted a concern with the cost of implementing the modification.
 - Fifth, although under no legal obligation to do so, Courtenay attempted to negotiate an agreement to compensate the Spragues' for implementing the takeoff/landing modification. However, before an agreement was finalized, the Spragues decided they were not willing to continue negotiations. In recent correspondence to the Commission, the Spragues asserted that they were "subject to high pressure tactics and false promises." In Courtenay's view, this is not an accurate description of the discussions and contract negotiations that took place between the Spragues and Courtenay. Courtenay made a good faith attempt to negotiate an agreement to address the Spragues' monetary concerns. Courtenay is open to continuing contract negotiations, if the Spragues wish to do so, and hopes an agreement can still be reached.
2. Concern #2: In their letter, the Spragues assert that Courtenay chose to show homes within 5,000 feet of the Project Area on Hearing Exhibit 4 in order to exclude the Spragues' private runway and to avoid FAA regulations. However, such is not the case.
- First, Hearing Exhibit 4 was intended to show the distance between the Project's proposed turbine locations and homes – it was not intended to show private runways.
 - Second, 5,000 feet was chosen because that is a distance at which potential issues, such as shadow flicker, are no longer a concern. As discussed in CFW's Shadow Flicker Assessment, "[i]t is generally accepted that shadow flicker from wind turbines is not perceptible beyond distances of 1500 meters (4921 feet)." *See* Hearing Exhibit 8, pg. 3.
 - Third, as discussed in response to the NDAC letter, the Sprague airstrip is (as they admit) a private runway, not a public airport. Thus, it is not entitled to protection under FAA regulations.
 - Fourth, regardless of what Courtenay depicted on Hearing Exhibit 4, the Project must and will comply with FAA regulations.
3. Concern #3: The Spragues note a concern with shadow flicker. As noted above, shadow flicker is not perceptible beyond distances of 1,500 meters (4,921 feet). *See* Hearing Exhibit 8, pg. 3. The Spragues' home is approximately 5,440 feet from the nearest proposed turbine location, so shadow flicker is not a concern at that distance.

The Spragues also noted a concern with impacts to property value. However, this is not a siting-related concern, as the Commission has noted repeatedly in past siting proceedings.

4. Concern #4: The Spragues note unresolved concerns presented to Courtenay after the public hearing, as well as issues regarding what information was and was not provided by Courtenay about the Project. First, as discussed above, Courtenay has or has attempted to resolve the Spragues' concerns. Second, as discussed below, Courtenay was not obligated to provide any information regarding the Project to the Spragues. Third, Courtenay has provided information about the Project to the local area for more than five years. Fourth, it is Courtenay's understanding that Courtenay Wind Farmers, LLC, an independently established and governed North Dakota company that was formed by local landowners to enable them to partner in development of the Project, provided Project information to the Spragues.
5. Concern #5: The Spragues requested that certain information be mailed to certain persons regarding the Project. However, there is no requirement in N.D.C.C. Ch. 49-22 or the Commission's rules that an applicant provide information or notice to landowners either within or outside of the Project footprint. The Commission provided the required public notice of the public hearing by two weeks' publication of the hearing notice, in accordance with N.D.C.C. § 49-22-13(4) and N.D. Admin. Code § 69-06-01-02(3)(a). *See* Affidavit of Service and Affidavit of Publication, Docket Item Nos. 15 and 23, filed May 23, 2013 and July 18, 2013, respectively. The final Project layout was filed with the Commission one week prior to the public hearing, per the Commission's request, and information regarding the Project was available on the Commission's website.

As noted above, the concerns raised in the Sprague letter are unsupported, have been adequately addressed, or have been refuted by the information and evidence Courtenay has presented.

III. Conclusion.

As discussed above, Courtenay has addressed the concerns raised in the Baumgartner letter. With respect to the concerns raised in the Hastings letter, the NDAC letter, and the Sprague letter, those concerns are unsupported assertions, or were adequately addressed or directly refuted by the information and evidence presented by Courtenay.

Courtenay has demonstrated that the Project complies with the Commission's siting requirements, as well as all other applicable federal, state and local laws and regulations. Therefore, Courtenay respectfully requests that the Commission issue a Certificate of Site Compatibility for the Project, including for Turbine Nos. 1, 2, 3, 10, 11, 12, 13, 21, and 22, and permanent Met Tower B.